RECORD AND BRIEFS

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No. 22O141, Original

In The Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion for Leave to File Complaint

REPLY BRIEF OF THE STATE OF TEXAS

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REPLY BRIEF OF THE STATE OF TEXAS

The State of Texas[1] hereby replies to New Mexico's Brief in Opposition to Texas' Motion for

[1] In direct response to New Mexico's contentions, the Rio Grande Compact Commissioner for the State of Texas, the Texas Commission on Environmental Quality, and the Attorney General of Texas are of the state, and are not "political subdivisions." New Mexico's reliance on *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) to question Texas' authority to file, is misplaced. *See* Opp. at 3, n.3. In an abundance of caution, attached hereto as Appendix A is a reprinted letter

Footnote continued on following page.

Leave to File Complaint (New Mexico's Opposition or Opp.).[2]

SUMMARY OF ARGUMENT

New Mexico seeks to avoid this Court's interpretation and enforcement of the Rio Grande Compact (Compact). New Mexico's Opposition should be rejected for at least four reasons. First, New Mexico's Opposition confirms that Texas and New Mexico have fundamental differences regarding the interpretation of Texas' rights and New Mexico's obligations under the Compact. New Mexico's actions, for example, violate, at a minimum, Articles I and IV of the Compact. Texas has standing to sue New Mexico because it does not receive the water it bargained for. Second, most of New Mexico's Opposition involves the merits of the case, including disputed factual matters, which are not part of the criteria for assessing a motion for leave to file a complaint. Third, this Court is the only forum that can resolve the issues tendered and the relief sought by Texas. Fourth, the United States is not an indispensable party.

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from the Attorney General of Texas confirming that Texas' pleadings are authorized submissions by the State of Texas.

[2] Colorado's Brief in Opposition takes no position with respect to the specific allegations contained in Texas' pleadings and, therefore, no separate reply to Colorado's Brief is necessary. Responses to assertions made by the City of Las Cruces are incorporated into this reply.

ARGUMENT

I. New Mexico's Opposition Confirms the Parties' Fundamental Differences Regarding Interpretation of the Compact, and Only This Court Can Resolve the Dispute

New Mexico argues that the Court should decline to accept jurisdiction because the Complaint fails to state a claim under the "express terms" of the Compact. Opp. at 9-11. There is, however, no requirement that an "express term" of a compact be violated in order for the Court to properly exercise its jurisdiction. Where the Court has accepted jurisdiction to address compact interpretation relating to depletions of surface flows by upstream groundwater pumping (as here), the absence of an express provision is what gave rise to the dispute and, therefore, proper exercise of jurisdiction. *See Montana v. Wyoming*, ___ U.S. ___, 131 S.Ct. 1765 (2011) (Yellowstone River Compact does not mention groundwater); *Kansas v. Nebraska*, 538 U.S. 720 (2003) (Republican River Compact does not mention groundwater); *Kansas v. Colorado*, 514 U.S. 673 (1995) (Arkansas River Compact does not mention groundwater); *Texas v. New Mexico*, 462 U.S. 554 (1983) (Pecos River Compact does not mention groundwater).

New Mexico mistakenly asserts that Texas' claims are not based on the terms of the Compact

but rather "arise from the [Rio Grande] Project." Opp. at 11. The Rio Grande Project (Project), however, is inextricably intertwined with the Compact. [3] The Compact cannot be understood without an understanding of the Rio Grande Project. The interrelationships between the Compact and the Project do not convert Texas' Compact claims into Project Claims. Texas' claims arise from the Compact.

Under New Mexico's view of the Compact, its only obligation is to deliver certain volumes of water to Elephant Butte Reservoir and it has absolutely no responsibility to address actions that it has authorized and allowed to occur within New Mexico between the reservoir and the Texas state line. Opp. at 12-14. New Mexico, however, cannot unilaterally define its Compact obligations. "A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States . . . is the function and duty of the Supreme Court of the Nation." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). New Mexico's understanding of its obligations only confirms the extent of this fundamental disagreement between the two states, and supports

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[3] The Rio Grande Project is referred to directly in the definition of "project storage" in Article I(k) of the Compact, and indirectly (by the use of that definition in other defined terms) over 50 times in the Compact.

the need for the Court to exercise its original jurisdiction in this case.

New Mexico's interpretation of its obligations under the Compact conflicts with the intent of the parties as expressed in the Compact's preamble:

> The State of Colorado, the State of New Mexico, and the State of Texas, [among other reasons] ... *for the purpose of effecting an equitable apportionment of such waters*, have resolved to conclude a Compact for attainment of these purposes....

Compact, 53 Stat. 785 (1939) (emphasis added); Appendix to Complaint at App. 1.

The water being equitably apportioned are those waters of the "Rio Grande Basin" as defined in Article I(b) of the Compact. The water apportioned to New Mexico by the Compact is the water in the Basin *above* Elephant Butte in excess of its delivery obligation, less the waters apportioned to Colorado. No water below Elephant Butte is apportioned to New Mexico. Under Articles I(k), (l) and (o) and Article IV the water in Elephant Butte is "project storage" of the Rio Grande Project, all of which is apportioned to Texas. This plain language assumes that water equitably apportioned to Texas will actually reach Texas unencumbered by the actions of New Mexico. Nothing in the Compact allows New Mexico to deliver its flow requirements into

Elephant Butte and then take it back once the water is delivered.[4] Accepting New Mexico's position would cause the Compact to fail for lack of consideration because Texas would have obtained nothing in return for its agreement to limit its claims to water from the Rio Grande.

Contrary to New Mexico's assertions, Texas is not asking the Court to rewrite or insert new terms into the Compact. *See* Opp. at 14-16. Rather, Texas seeks an interpretation of the Compact based on the language of the Compact, the intent of the signatories, and the circumstances that existed at the time the Compact was entered into. These circumstances include the parties' assumption embodied in the Compact that Project water would be allowed to flow unimpeded into Texas. Compacts are contracts, and the Court interprets compacts according to the intent of the parties. *Montana v. Wyoming*, 131 S.Ct. at 1771 n.4; *Alabama v. North Carolina*, __ U.S. __ , 130 S.Ct. 2295, 2317 (2010) (Kennedy, J., concurring). To ascertain the intent of the parties and aid in its interpretation, the Court may consult extrinsic evidence including the parties' course of performance, *Alabama*, 130 S.Ct. at 2310; contemporaneously enacted interstate compacts, *Texas*, 462 U.S. at 565; and the history of compact

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[4] New Mexico's right, if any, to take water from storage in Elephant Butte is based solely on federal contracts issued under the authority of the Project. *Israel v. Morton*, 549 F.2d 128 (9th Cir. 1977).

negotiations, *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). Where there is a dispute of the parties' intent, extrinsic material is appropriately considered. *See Alabama*, 130 S.Ct. at 2317 (Kennedy, J., concurring).

New Mexico implicitly acknowledges the importance of extrinsic evidence when it cites to the 1929 Compact[5] and the Pecos River Compact to support its interpretation of the Rio Grande Compact. *See* Opp. at 16, 20. New Mexico, however, selectively ignores other extrinsic evidence, including the conditions that existed when the signatories drafted the Compact. A plain reading of the Compact should "make[ ] sense in light of the circumstances existing in the signatory States when the Compact was drafted." *Montana*, 131 S.Ct. at 1778 (noting that the Yellowstone River Compact "would have been written to protect the irrigation uses that were legislatively favored ....") To resolve the current and serious dispute over waters of the Rio Grande, Texas asks this Court to interpret, not rewrite, the Compact in accordance with the circumstances that existed at the time the Compact was drafted and executed.

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[5] Ironically, by citing and relying on Article XII of the 1929 Compact, New Mexico has violated its agreement in Article XVI of the 1929 Compact. *See* 46 Stat. 767, 773.

II. Merits Arguments Are Irrelevant to This Court's Decision to Grant Texas' Motion

Most of New Mexico's Opposition addresses the merits of the case. *See* Opp. at 9-21. The question of whether the Court has jurisdiction over an original action is distinct from whether the complaint should be dismissed on the merits. *See Wyoming v. Oklahoma*, 502 U.S. 437, 441 (1992) ("[W]e granted Wyoming leave to file its bill of complaint over Oklahoma's objections that Wyoming lacked standing to bring this action and ... should not be permitted to invoke this Court's original jurisdiction."). The Court should not consider New Mexico's premature request to decide the relative strength of the evidence. The purpose of the Motion for Leave is to determine whether Texas should be given a chance to prove its claims. The Court has stated: "[A]t this stage we certainly have no basis for judging Nebraska's proof, and no justification for denying Nebraska the chance to prove what it can." *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995); *see also Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (overruling demurrer to the bill of complaint on the grounds that Kansas should be allowed to discover facts necessary to prove its case). *See also Montana v. Wyoming*, 552 U.S. 1175 (2008) (the Court granted Montana leave to file a complaint, and, in the opinion granting leave, allowed Wyoming to file a motion to dismiss which was denied); *Montana v. Wyoming*, 131 S.Ct. at 1769.

At this stage, the Court only assesses the nature of Texas' interest in the interpretation and enforcement of the Compact and the adequacy of an alternative forum. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). The Court does not now assess the merits of either side's Compact interpretation.

III. The Issues Tendered by Texas Cannot Be Resolved in Alternative Forums

New Mexico claims that the federal court litigation it initiated in New Mexico (District Court), and the general stream adjudication in New Mexico's state court (State Adjudication), are adequate alternative forums to this original jurisdiction action by Texas. Opp. at 22. Texas' claims, however, arise from its dispute with New Mexico over proper interpretation of the Compact, and from New Mexico's refusal to respect Texas' equitable apportionment of Rio Grande water. No other forum has jurisdiction to resolve these disputes and no alternative forum is currently involved in these disputes. Only this Court can vindicate Texas' claims involving interstate compact interpretation and enforcement. *See Texas v. New Mexico*, 462 U.S. at 568-69 (finding the Court's exercise of its original jurisdiction was appropriate, in part, because "New Mexico is the upstream State, with effective power to deny water altogether to Texas ....").

A. The Federal District Court Action in New Mexico Is Not an Adequate Alternative Forum

New Mexico asserts that its District Court suit challenging the 2008 Operating Agreement is a sufficient alternative forum. The 2008 Operating Agreement, however, is not directly an issue in this case. Texas' Complaint neither seeks to defend nor attack that Agreement. New Mexico's federal lawsuit argument is an attempt to circumvent the exclusive jurisdiction of this Court. *See Mississippi v. Louisiana*, 506 U.S. at 77-78 (rejecting federal district court jurisdiction over an interstate boundary dispute because Congress granted "original and *exclusive* jurisdiction of all controversies between two or more States" to the Supreme Court) (quoting 28 U.S.C. § 1251(a), emphasis in original). New Mexico, in fact, alleges that its challenge to the 2008 Operating Agreement is "not based on the Compact," and that "[n]one of the[] claims are against Texas." Opp. at 25. Because the District Court action involves different parties and different issues, it is not an adequate forum for Texas' Compact claims.

Any judgment entered in the District Court action will not provide the protection of Texas' equitable apportionment of water under the Compact. New Mexico cites *Arizona v. New Mexico*, 425 U.S. 794 (1976), a tax case, for the proposition that a related action based on similar issues provides an alternative forum. Opp. at 23. That case is

inapposite because it did not involve an interstate compact. Only the Supreme Court has both original and *exclusive* jurisdiction over disputes like this one involving the states' sovereign interests in interpretation and enforcement of interstate compacts. *Mississippi v. Louisiana*, 506 U.S. at 77-78; *see also Maryland v. Louisiana*, 451 U.S. 725, 744 (1981).

B. The General Stream Adjudication of the Lower Rio Grande in State Court Is Not an Adequate Alternative Forum

This Court does not allow intrastate general stream adjudications to interfere with the exercise of its original jurisdiction. *Arizona v. California*, 460 U.S. 605 (1983) (apportioning waters of the Colorado River concurrent with general stream adjudications on Colorado tributaries); *see also Montana v. Wyoming*, No. 137 Orig., First Interim Report of the Special Master (Feb. 10, 2010) (Special Master found that intrastate remedies did not preclude Montana from enforcing its rights under the Yellowstone Compact).

A state court stream adjudication cannot resolve disputes between states as to the apportionment of interstate waters. *See Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907) (the Court's exercise of its original jurisdiction is necessary to determine the relative rights of two states to an interstate stream). Texas cannot be made a party to

the State Adjudication without its consent. Where the terms of an interstate compact are in dispute, it is the role and duty of this Court to resolve that dispute. *Texas v. New Mexico*, 462 U.S. at 567-68.

New Mexico incorrectly asserts that the United States' claims to Project water in the State Adjudication provide a state law remedy to vindicate Texas' interests. *See* Opp. at 31. New Mexico confuses the United States' distinct interest in Project water with Texas' interest in obtaining and seeking interpretation and enforcement of the Compact. While the State Adjudication may resolve intrastate disputes, it will not remedy interstate claims for violation of an interstate compact.

IV. The United States Is Not an Indispensable Party[6]

The Court need not consider the indispensability of the United States in determining whether to exercise original jurisdiction. *See Idaho ex rel. Andrus v. Oregon & Washington*, 429 U.S. 163, 164 (1976). Regardless, the United States is not an indispensable party because Texas' claims against New Mexico do not implicate the Bureau of Reclamation's (Reclamation) role in distributing

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[6] New Mexico uses the term "indispensible" parties which reflects the 1957 language of Federal Rule of Civil Procedure 19. Since then, Rule 19 has been liberalized and refers to the feasibility of joining a "required" party.

Project water, or the United States' role as a trustee for Native American tribes. New Mexico argues incorrectly that a decree issued by this Court will affect the United States' interests in the Project. *See* Opp. at 33. This action, however, involves New Mexico's unlawful authorization of the interception and use of water in New Mexico that is apportioned to Texas under the Compact. Complaint at ¶¶ 19, 20. This action does not challenge or directly involve the United States' role in operating or delivering Project water. This Court can afford Texas full relief without the United States. As such, the United States is not indispensable to this action. *Idaho ex rel. Evans v. Oregon & Washington*, 444 U.S. 380, 392 (1980) (holding the failure to join the United States did not require dismissal); *see also Nebraska v. Wyoming*, 295 U.S. 40, 42-43 (1935) (holding that the United States was not an indispensable party, despite federal management of related water storage reservoirs).

New Mexico's reliance on *Texas v. New Mexico*, 352 U.S. 991 (1957) is misplaced. There the Court adopted the ruling of the Special Master that the United States was an indispensable party, but did so specifically and solely due to the United States' role as trustee for tribes situated *above* Elephant Butte Reservoir. *Texas v. New Mexico*, No. 9 Orig. (1953), Green, J., Report of Special Master: Respecting Indispensability the United States and of Elephant Butte Irrigation District, as Parties, at 47. The Special Master rejected *all* of New Mexico's other indispensable party claims, including the

United States' obligations with respect to Mexico, and federal ownership of Elephant Butte and Caballo Reservoirs. *Id.* at 13, 16, 21-23.

Here, Texas seeks no relief that would affect the rights or interests of the United States; Texas' claims will not prejudice the interests of the United States; and Texas does not allege that Reclamation is releasing more surface water to Project beneficiaries in New Mexico than it should. The United States will not need to take action in order for this Court to afford complete relief to Texas. As a result, the interests of the United States are not so intertwined in the resolution of Texas' claims so as to restrict the Court's ability to render a final judgment of such claims. Accordingly, the United States is not an indispensable party.[7]

V. This Court Can Require New Mexico to Give Full Faith and Credit to Texas' State Water Adjudication

The Full Faith and Credit Clause of the United States Constitution requires that New Mexico acknowledge Texas' state adjudication of Rio Grande water. Absent New Mexico's compliance with the Compact, the Texas adjudication loses its

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[7] While the United States is not indispensible, Texas would not object to the United States' intervention, or the Court's obtaining the United States' views with respect to the issues raised by Texas.

practical effect. Complaint at ¶ 22. By not acknowledging the Texas adjudication, New Mexico fails to comply with the Compact.

CONCLUSION

The State of Texas' Motion for Leave to File Complaint should be granted.

Respectfully submitted,

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March 2013

[LOGO]

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 13, 2013

Mr. Stuart Somach
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Re: *State of Texas v. State of New Mexico & State of Colorado,* No. 220141 in the Supreme Court of the United States.

Dear Mr. Somach:

This is to confirm that you have been authorized to represent the State of Texas in the above captioned matter by your outside-counsel contract with the Texas Commission on Environmental Quality (2013-582-0356) executed under the authority found in Texas Government Code §402.0212, 1 Texas Administrative Code, Chapter 57 and the General Appropriations Act, 82nd Leg., H.B. 1, art. IX §16.01. This office confirms that pursuant to this authority any filings you make in this case are made on behalf of the State of Texas.

Sincerely,

/s/ J D Blacklock
James D. Blacklock
Deputy Attorney General for Legal Counsel

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